No. 09-650

In the Supreme Court of the United States

KELMER DA SILVA NEVES, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
STACEY I. YOUNG
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that it lacked jurisdiction to review the Board of Immigration Appeals' conclusion that petitioner did not exercise due diligence in moving to reopen his removal proceedings to apply for adjustment of status under 8 U.S.C. 1255(i).

2. Whether the court of appeals correctly determined that it lacked jurisdiction to review the Board's decision not to exercise its authority to reopen petitioner's removal proceedings *sua sponte*.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Discussion 10
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Arai, In re, 13 I. & N. Dec. 494 (B.I.A. 1970) 3
Beltre-Veloz v. *Mukasey*, 533 F.3d 7 (1st Cir. 2008) 14
Boakai v. *Gonzales*, 447 F.3d 1 (1st Cir. 2006) 9, 11, 12
Chedid v. *Holder*, 573 F.3d 33 (1st Cir. 2009) 14
Elkins v. *Moreno*, 435 U.S. 647 (1978) 3
Fustaguio do Nascimento v. *Mukasey*, 549 F.3d 12 (1st Cir. 2008) 9, 11, 12, 13
G-D-, In re, 22 I. & N. Dec. 1132 (B.I.A. 1999) 5
Guerrero-Santana v. *Gonzales*, 499 F.3d 90 (1st Cir. 2007) 14
INS v. *Abudu*, 485 U.S. 94 (1988) 4
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 2
INS v. *Doherty*, 502 U.S. 314 (1992) 4
Kucana v. *Holder*, 130 S. Ct. 827 (2010) 10, 13, 15, 19
Luis v. *INS*, 196 F.3d 36 (1st Cir. 1999) 10, 18
Ouk v. *Mukasey*, 551 F.3d 82 (1st Cir. 2008) 9, 11, 13
Patel, In re, 17 I. & N. Dec. 597 (B.I.A. 1980) 3
Peralta v. *Holder*, 567 F.3d 31 (1st Cir. 2009) 10, 18, 19
Pierre, In re, 15 I. & N. Dec. 461 (B.I.A. 1975) 2
Punzalan v. *Holder*, 575 F.3d 107 (1st Cir. 2009) 14

Cases—Continued: Page

United States v. *Ryan-Webster*, 353 F.3d 353 (4th Cir. 2003) 17
Wisniewski v. *United States*, 353 U.S. 901 (1957) 14
Zhao v. *Gonzales*, 404 F.3d 295 (5th Cir. 2005) 15

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 701(a)(2) 18
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
8 U.S.C. 1101(a)(42)(A) 2
8 U.S.C. 1158(b)(1) 2
8 U.S.C. 1158(b)(1)(A) 2
8 U.S.C. 1158(b)(1)(B)(i) 2
8 U.S.C. 1182(a)(5)(A)(i) 17
8 U.S.C. 1227(a)(1)(B) 5
8 U.S.C. 1229a(c)(7) 9, 11, 15
8 U.S.C. 1229a(c)(7)(A) 4, 11
8 U.S.C. 1229a(c)(7)(B) 3, 4
8 U.S.C. 1229a(c)(7)(C) 11
8 U.S.C. 1229a(c)(7)(C)(i) 4
8 U.S.C. 1229a(c)(7)(C)(ii) 4
8 U.S.C. 1229a(c)(7)(C)(iv) 11
8 U.S.C. 1231(b)(3)(A) 2
8 U.S.C. 1252 13
8 U.S.C. 1252(a)(2) 13
8 U.S.C. 1252(a)(2)(A) 13
8 U.S.C. 1252(a)(2)(B) 13
8 U.S.C. 1252(a)(2)(B)(i) 13

Statute and regulations—Continued: Page

8 U.S.C. 1252(a)(2)(B)(ii) 19
8 U.S.C. 1252(a)(2)(C) 12, 13
8 U.S.C. 1252(a)(2)(D) 12, 14
8 U.S.C. 1255 (§ 245) 2
8 U.S.C. 1255(a)(2) 3
8 U.S.C. 1255(a)(3) 3
8 U.S.C. 1255(i) 8
8 U.S.C. 1255(i)(2) 17
8 U.S.C. 1255(i)(2)(A) 3
8 U.S.C. 1255(i)(2)(B) 3
8 C.F.R.:
Section 1003.2(a) 4, 5
Section 1003.2(c) 3
Section 1003.2(c)(1) 4
Section 1003.2(c)(2) 4, 7, 8, 9, 11
Section 1003.2(c)(3) 11
Section 1003.2(c)(3)(ii) 4
Section 1003.23 3
Section 1003.23(b)(1) 4
Section 1003.23(b)(3) 4
Section 1003.23(b)(4) 4
Section 1208.13(a) 2
Section 1240.8(d) 2

In the Supreme Court of the United States

No. 09-650

KELMER DA SILVA NEVES, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 568 F.3d 41. The opinions of the Board of Immigration Appeals (Pet. App. 7-9) and the immigration judge (Pet. App. 10-16) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2009. A petition for rehearing was denied on September 3, 2009 (Pet. App. 17-18). The petition for a writ of certiorari was filed on December 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security and the Attorney General may, in their discretion, grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). The applicant bears the burden of demonstrating that he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1).

Withholding of removal is available if the alien demonstrates that his "life or freedom would be threatened" in the country of removal "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). In order to establish eligibility for withholding of removal, an alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). Persecution must be at the hands of the government or by an entity that the government is unwilling or unable to control. *In re Pierre*, 15 I. & N. Dec. 461, 462 (B.I.A. 1975).

b. Section 245 of the INA, 8 U.S.C. 1255, provides that the Attorney General and the Secretary of Homeland Security may, in their discretion, adjust the status

of an alien inspected and admitted into the United States to that of a lawful permanent resident. Several prerequisities must be met, including that the alien must be "eligible to receive an immigrant visa" and "admissible to the United States for permanent residence," and that "an immigrant visa [must be] immediately available to [the alien] at the time his application [for adjustment] is filed." 8 U.S.C. 1255(a)(2) and (3), 1255(i)(2)(A) and (B).

Even if all of the statutory prerequisities are met, adjustment of status is not automatic. "The grant of an application for adjustment of status under section 245 is a matter of administrative grace," and the applicant "has the burden of showing that discretion should be exercised in his favor." *In re Patel*, 17 I. & N. Dec. 597, 601 (B.I.A. 1980). See also, *e.g.*, *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978) (Adjustment of status is "a matter of grace, not right."). Whether a particular applicant warrants a favorable exercise of discretion is a case-specific determination that depends upon whether the applicant has demonstrated that any adverse factors present in his application are "offset * * * by a showing of unusual or even outstanding equities." *In re Arai*, 13 I. & N. Dec. 494, 495-496 (B.I.A. 1970).

2. An alien may file a motion to reopen removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c). Such a motion is to be filed with the immigration judge (IJ) or the Board of Immigration Appeals (Board), depending upon which was the last to render a decision in the matter. 8 C.F.R. 1003.2(c) (Board), 1003.23 (IJ). The alien must "state the new facts that will be proven at a hearing to be held if the motion is granted" and must support the motion "by affidavits or other evidentiary

material." 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), 1003.23(b)(3). Where the motion to reopen is filed with the Board, it "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1); see also 8 C.F.R. 1003.23(b)(3) (IJ).

An alien is entitled to file only one such motion to reopen, and it must be filed within 90 days of entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1). Those limitations do not apply, however, if the motion to reopen adequately shows that asylum or withholding of removal is appropriate based on "changed country conditions arising in the country of nationality or in the country to which removal has been ordered" since the time of the removal order. 8 U.S.C. 1229a(c)(7)(C)(ii); see 8 C.F.R. 1003.2(c)(3)(ii), 1003.23(b)(4).

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). The Board has broad discretion in adjudicating a motion to reopen, and it may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a); see *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

If an alien does not file his motion to reopen within the 90-day time period, the IJ or the Board still may reopen his case *sua sponte*. 8 C.F.R. 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."), 1003.23(b)(1) (similar for IJ). Whether to reopen a case

sua sponte is entrusted to the discretion of the Board. 8 C.F.R. 1003.2(a). The Board "invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

3. Petitioner is a native and citizen of Brazil. Pet. App. 2. The former Immigration and Naturalization Service charged him with being removable as an alien who remained in the United States beyond the time permitted. *Id.* at 10-11; see 8 U.S.C. 1227(a)(1)(B). Petitioner conceded that he is removable as charged but sought asylum, withholding of removal, and voluntary departure. Pet. App. 11.

After a hearing, an IJ found petitioner removable as charged and denied his applications for asylum, withholding of removal, and voluntary departure. Pet. App. 10-16. Petitioner had contended that he would be subject to persecution in Brazil because he was threatened and beaten by a nightclub owner when he worked as an investigator for the state-owned electric company. *Id.* at 12. Petitioner testified that he reported the threats and beating to the police, the police arrested the nightclub owner and his associates, petitioner received further threats, and petitioner then decided to leave Brazil and come to the United States. *Id.* at 12-13. The IJ found that petitioner was not a credible witness based on his demeanor and the implausibility of his story. *Id.* at 13-14. In particular, the IJ determined that petitioner's testimony that the police would not investigate the nightclub owner's threats but instead suggested to

petitioner that he should leave Brazil was "not at all plausible." *Id.* at 13-14.

The IJ further determined that "even if everything [petitioner] testified to is * * * believed," petitioner failed to carry his burden of showing eligibility for asylum or withholding of removal. Pet. App. 14-15. The IJ explained that petitioner "worked for the government of Brazil" and "[c]learly * * * does not fear any harm from the government." *Id.* at 14. The IJ also noted that there was no evidence to suggest that petitioner would be harmed in Brazil "on account of one of the five statutory grounds." *Ibid.* Finally, the IJ denied petitioner's request for voluntary departure because petitioner had not satisfied one of the statutory prerequisites for that privilege (one year of physical presence in the United States). *Id.* at 15.

The Board dismissed petitioner's appeal. Administrative Record 85 (A.R.); see Pet. App. 2. The Board explained that petitioner "appear[ed] to have * * * abandoned" his appeal and that the Clerk's Office's "efforts * * * to reach [petitioner] by mail have been unsuccessful" and that it "lack[s] an address to which mail can effectively be sent." A.R. 85. The Board stated that it would send its decision to petitioner's last known address and that, if petitioner filed a timely motion to reconsider, it would consider reinstating the appeal. *Ibid.* The Board also stated that, "[p]ursuant to the Immigration Judge's order," petitioner would be permitted to voluntarily depart from the United States, but that if he failed to do so within 30 days, he would be rendered ineligible for various forms of discretionary relief, including adjustment of status. *Ibid.*

4. In August 2003, nearly two years after the Board dismissed his appeal, petitioner filed a motion to reopen

his immigration proceedings. A.R. 57-65. He contended that his first attorney had been ineffective by failing to pursue his appeal before the Board and that a second attorney he had secured had been ineffective because that attorney had failed to notify the Board that he was the new counsel of record and had failed to obtain an approved labor certification for petitioner, which would have been a basis for seeking adjustment of status. A.R. 58-63. Petitioner contended that, as a remedy for his attorneys' errors, he should be granted voluntary departure. A.R. 63-64.

The Board denied the motion to reopen. A.R. 51. It explained that the motion to reopen was untimely, because under 8 C.F.R. 1003.2(c)(2), such a motion must be filed within 90 days of the Board's decision. A.R. 51. The Board then determined that petitioner's ineffective assistance of counsel claim did not excuse his untimely filing. *Ibid.* The Board explained that, "[d]espite [the] assertions against two individuals he claims acted as his representatives, [petitioner] appeared pro se on appeal and the record contains no evidence that a representative had any involvement in this case after the removal hearing." *Ibid.* In any event, the Board determined, equitable tolling of the 90-day deadline was not available because petitioner did not exercise due diligence in seeking reopening. *Ibid.* The Board explained that petitioner "admits that he learned of the Board's prior order in August, 2002," yet did not file his motion to reopen until a year later, in August 2003. *Ibid.* Finally, the Board declined to reinstate the voluntary departure order, noting that the IJ had found petitioner ineligible for that privilege and that the Board's prior statement regarding voluntary departure thus had been "made in

error." *Ibid.* Petitioner did not seek further review of that decision by the Board.

5. In June 2006, almost five years after the Board's initial decision, petitioner filed a second motion to reopen proceedings. A.R. 7-17; see Pet. App. 2. Petitioner contended that reopening was justified so that he could seek adjustment of status under 8 U.S.C. 1255(i) based on his assertion that he was the beneficiary of an approved labor certification. A.R. 17. Petitioner argued that the time and numerical limitations for motions to reopen should not bar his motion because his prior attorneys (including his third attorney, who filed the first motion to reopen) had been ineffective, and that his third attorney had failed to advise him that his prior motion to reopen had been denied. A.R. 11, 14-15, 39. Petitioner further alleged that it was not until June 2006 that he learned that the Board had denied his first motion to reopen in December 2003. *Ibid.* In the alternative, petitioner requested that the Board reopen his case *sua sponte*. A.R. 11.

The Board denied petitioner's second motion to reopen. Pet. App. 7-9. The Board observed that petitioner's motion was "untimely and number-barred" under 8 C.F.R. 1003.2(c)(2), and it determined that petitioner failed to show that he exercised due diligence that would justify equitable tolling. Pet. App. 7-8. In particular, the Board noted that although petitioner alleged that he frequently contacted his attorney's office between the time the motion to reopen was filed in 2003 and when he learned of its denial in 2006, he did not "provide[] the dates that he contacted his former attorney's office from 2003 to 2006, or who he spoke to when he contacted the office." *Id.* at 8. The Board also noted that, although petitioner asserted that the employee in

his attorney's office who failed to notify him of the Board's action had been fired, petitioner failed "to identify the particular employee responsible for notifying" him. *Ibid.* Thus, the Board determined, petitioner had "not provided sufficient specific, relevant information to corroborate his generalized assertion of due diligence." *Ibid.* Finally, the Board declined to exercise its discretionary authority to reopen petitioner's case on its own motion. *Ibid.*

6. The court of appeals dismissed petitioner's petition for review in a per curiam opinion. Pet. App. 1-4. The court first determined that petitioner's second motion to reopen was both untimely and number barred under 8 U.S.C. 1229a(c)(7) and 8 C.F.R. 1003.2(c)(2). Pet. App. 2. The court then observed that, even if equitable tolling applied to those limitations (a question it did not decide), the Board had determined that tolling was not warranted because petitioner failed to demonstrate due diligence. *Id.* at 3. The court determined that, based on its prior precedents, it lacked jurisdiction to review an alien's challenge to the Board's factual determination that he failed to exercise due diligence, where, as here, the challenge did not raise any constitutional or legal claim. *Id.* at 3-4 (citing *Ouk* v. *Mukasey*, 551 F.3d 82, 83-84 (1st Cir. 2008); *Fustaguio do Nascimento* v. *Mukasey*, 549 F.3d 12, 18-19 (1st Cir. 2008); and *Boakai* v. *Gonzales*, 447 F.3d 1, 4 (1st Cir. 2006)).[1] The court also held that it lacked jurisdiction to review the Board's decision not to reopen a case on its

[1] The court of appeals did not pass on petitioner's ineffective assistance of counsel claim: it noted that, because the Board's denial of reopening was based on lack of due diligence, that claim was not before the court, and it determined, in any event, that petitioner had waived any such argument. Pet. App. 3 n.1.

own motion. *Id.* at 4 (citing *Peralta* v. *Holder*, 567 F.3d 31 (1st Cir. 2009), and *Luis* v. *INS*, 196 F.3d 36 (1st Cir. 1999)).

DISCUSSION

Petitioner contends (Pet. 5-11) that the court of appeals erred in holding that it lacked jurisdiction to review the Board's factual determination that he failed to demonstrate due diligence in seeking to reopen his removal proceedings. He also contends (Pet. 5-9) that the Board abused its discretion in declining to reopen his case.

The court of appeals erred in holding that it lacked jurisdiction to review petitioner's claim of due diligence. But the court's ultimate denial of relief was correct because, even if equitable tolling applies to untimely motions to reopen (an issue the court of appeals and Board did not decide), the Board did not abuse its discretion in holding that petitioner failed to demonstrate the due diligence that would be required for equitable tolling. Finally, the court of appeals' determination that it may not review the Board's denial of *sua sponte* reopening is correct and consistent with the unanimous view of the other courts of appeals. Plenary review is therefore unwarranted. However, because the court of appeals erred in holding, at the urging of the government, that it did not have jurisdiction to review the Board's determination that equitable tolling was not warranted, the Court may wish to grant the petition, vacate the judgment of the court of appeals, and remand the case to the court of appeals for further consideration in light of *Kucana* v. *Holder*, 130 S. Ct. 827 (2010), and the position set forth in this brief. In the alternative, the petition for a writ of certiorari should be denied.

1. At issue in this case is the Board's denial of petitioner's second motion to reopen, filed almost five years after the Board's first decision. The relevant statute and regulation clearly provide, however, that a motion to reopen "must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened." 8 C.F.R. 1003.2(c)(2); see 8 U.S.C. 1229a(c)(7)(C). And an alien is entitled to file only one motion to reopen. 8 U.S.C. 1229a(c)(7)(A); 8 C.F.R. 1003.2(c)(2). The 90-day filing deadline is subject to limited statutory and regulatory exceptions, see 8 U.S.C. 1229a(c)(7)(C)(iv); 8 C.F.R. 1003.2(c)(3), but petitioner does not contend that any of them applies here. Instead, he contends (Pet. 6-7) that the time and numerical limitations are subject to equitable tolling. The Board assumed without deciding that the time and number requirements may be equitably tolled, but determined that the such tolling was not warranted here because petitioner failed to show that he exercised due diligence in presenting his claim to the Board. Pet. App. 7-8.

a. The court of appeals held that it lacked jurisdiction to review petitioner's claim that the Board erred in finding that he had not shown due diligence to excuse compliance with the time and number requirements for motions to reopen contained in 8 U.S.C. 1229a(c)(7) and 8 C.F.R. 1003.2(c)(2). Pet. App. 2-3. That holding was in error. The court's holding was based on three of its prior precedents: *Ouk* v. *Mukasey*, 551 F.3d 82, 83-84 (1st Cir. 2008); *Fustaguio do Nascimento* v. *Mukasey*, 549 F.3d 12, 18-19 (1st Cir. 2008); and *Boakai* v. *Gonzales*, 447 F.3d 1, 4 (1st Cir. 2006). In *Boakai*, the first of those cases, the court of appeals considered whether it had jurisdiction to review the Board's decision not to

grant equitable tolling of the deadline for filing a motion to reopen. 447 F.3d at 1-4. The court held that it lacked jurisdiction, because the petitioner in that case was an aggravated felon, and 8 U.S.C. 1252(a)(2)(C) bars review of "any final order of removal against an alien who is removable by reason of having committed" an aggravated felony. 447 F.3d at 4. The petitioner argued that his equitable tolling claim nonetheless was reviewable under 8 U.S.C. 1252(a)(2)(D) because it raised a "constitutional claim[] or question[] of law," but the court rejected that argument because the "factual determination that [the petitioner] had not exercised due diligence" is a question of fact, not a question of law. 447 F.3d at 4. Thus, the First Circuit did not hold in *Boakai* that it lacked jurisdiction over every claim that the Board erred in finding an alien had not exercised due diligence sufficient to equitably toll the motion-to-reopen deadline. Instead, the court held that it lacked jurisdiction over Boakai's claim because he was an aggravated felon. *Id.* at 3-4.

In *Fustaguio do Nascimento* and *Ouk*, the court of appeals again considered whether it had jurisdiction to review the Board's determination that an alien failed to demonstrate due diligence that would justify equitable tolling of the motion-to-reopen deadline. Neither of those cases, however, concerned an alien who was an aggravated felon. In *Fustagio do Nascimento*, the court remarked in passing that "where the [Board's] decision that equitable tolling is unavailable was based 'on a factual determination that [the petitioner] had not exercised due diligence,' we do not have jurisdiction to review the [Board's] decision." 549 F.3d at 18-19 (second pair of brackets in original) (quoting *Boakai*, 447 F.3d at 4). But the court did not otherwise discuss jurisdiction,

and it went on to uphold the Board's factual determination that the petitioner failed to exercise due diligence. *Id.* at 19. In *Ouk*, the court of appeals again held that it lacked jurisdiction to review "the factual determination that [the alien] had not exercised due diligence, which is a precondition to equitable tolling, if tolling is even available in these circumstances." 551 F.3d at 83. The court cited its decision in *Fustaguio do Nascimento* but did not otherwise discuss why jurisdiction was lacking.

In its brief to the court of appeals, the government argued that the court lacked jurisdiction to review the Board's determination that petitioner failed to show due diligence that would justify equitable tolling, relying on *Bokai* and *Fustaguio do Nascimento*. Gov't C.A. Br. 13-14. The court of appeals agreed. Pet. App. 3-4. The government's submission, and the court's ruling on his point, were in error. Under 8 U.S.C. 1252, an alien may seek judicial review of a final decision by the Board. Section 1252(a)(2) lists several matters that are not subject to judicial review, including certain decisions by immigration officers regarding admissibility, see 8 U.S.C. 1252(a)(2)(A); certain denials of discretionary relief, see 8 U.S.C. 1252(a)(2)(B); and removal orders entered against criminal aliens, see 8 U.S.C. 1252(a)(2)(C). None of those jurisdictional bars applies to petitioner's case. Unlike the petitioner in *Boakai*, petitioner is not an aggravated felon. And the denial of a motion to reopen is not one of the discretionary decisions that is unreviewable under 8 U.S.C. 1252(a)(2)(B). See *Kucana* v. *Holder*, 130 S. Ct. 827, 834-840 (2010). Although petitioner ultimately seeks discretionary relief in the form of adjustment of status, the Board decision at issue is not one "regarding the granting of [that] relief," 8 U.S.C. 1252(a)(2)(B)(i), because the Board did

not decide whether to exercise its discretion to grant petitioner adjustment of status or deny reopening on the ground that the Board would not in any event grant petitioner adjustment of status in the exercise of its discretion. See Pet. 10. Accordingly, none of the jurisdictional bars applies in this case, and there accordingly is no reason to consider (see Pet. 9-11) whether jurisdiction would be restored under the provision permitting review of "constitutional claims or questions of law" under 8 U.S.C. 1252(a)(2)(D).

b. Despite the court of appeals' mistaken jurisdictional holding, the Court may wish to deny the petition for a number of reasons.

First, as petitioner notes (Pet. 6), different panels of the First Circuit have come to different conclusions on this issue, and the court of appeals (rather than this Court) should resolve that confusion. See, *e.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) (Court does not review intra-circuit conflict). Although the court of appeals determined that it lacked jurisdiction in this case, it has exercised jurisdiction to review a determination regarding whether an alien showed due diligence sufficient to justify equitable tolling in at least four other cases: *Punzalan* v. *Holder*, 575 F.3d 107, 111 n.3 (1st Cir. 2009); *Chedid* v. *Holder*, 573 F.3d 33, 37-38 (1st Cir. 2009); *Beltre-Veloz* v. *Mukasey*, 533 F.3d 7, 11 (1st Cir. 2008); *Guerrero-Santana* v. *Gonzales*, 499 F.3d 90, 93-94 (1st Cir. 2007). Notably, petitioner does not contend that there is any disagreement in the circuits on this question that extends beyond some confusion in the First Circuit. Indeed, after this Court's recent decision in *Kucana*, it is clear that the courts of appeals generally do have jurisdiction to review denials of motions to reopen.

Second, and in any event, the Board did not abuse its discretion in denying petitioner's second motion to reopen. As petitioner acknowledges (Pet. 5), the courts of appeals review denials of motions to reopen under the highly deferential abuse-of-discretion standard, generally upholding the Board's decision "so long as it is not capricious, racially invidious, utterly without foundation in the evidence, or otherwise so irrational that it is arbitrary rather than the result of any perceptible rational approach." *Zhao* v. *Gonzales*, 404 F.3d 295, 304 (5th Cir. 2005) (internal quotation marks omitted). See also *Kucana*, 130 S. Ct. at 834 ("Mindful of the Board's broad discretion in [adjudicating motions to reopen], * * * courts have employed a deferential, abuse-of-discretion standard of review.") (internal quotation marks omitted).

Here, the Board did not abuse its discretion in concluding that petitioner failed to exercise due diligence sufficient to excuse petitioner's failure to comply with the numerical and time limitations on motions to reopen. Both the Board and the court of appeals assumed, but did not decide, that the time and numerical limitations on motions to reopen contained in 8 U.S.C. 1229a(c)(7) may be equitably tolled. Pet. App. 3, 7-8. Assuming *arguendo* that Congress's express limitations on motions to reopen may be equitably tolled upon a showing that an alien exercised due diligence in seeking reopening, petitioner failed to make that showing. As the Board explained, petitioner alleged that after his third attorney filed a motion to reopen in April 2003—a motion that was itself untimely—he regularly stayed in contact with his attorney, and although the motion to reopen was denied in December 2003, he did not learn of it until June 2006. *Id.* at 8. Yet petitioner failed to provide sufficient

detail regarding his contacts with his attorney between 2003 and 2006 to substantiate his claim of diligence, including when he made the contacts, who he spoke with, and what he was told. *Ibid.* Moreover, although petitioner said the error in not notifying him was the fault of one of his attorney's employees, petitioner did not identify that employee or provide other details of the alleged mistake. *Ibid.* In short, after reviewing all of the evidence, the Board concluded that petitioner "has not provided sufficient specific, relevant information to corroborate his generalized assertion of due diligence." *Ibid.* The Board did not abuse its discretion in holding that petitioner's unsubstantiated assertions of due diligence did not meet the heavy burden of justifying reopening, especially when petitioner's initial removal order became final five years before he filed his second motion to reopen.[2]

Third, even if petitioner had demonstrated that he received ineffective assistance from his prior attorneys such that equitable tolling was warranted and that he pursued his second motion to reopen with due diligence, the Board could have denied his motion to reopen because petitioner did not demonstrate that he qualified for the underlying relief he seeks—adjustment of status. To qualify for adjustment of status, an applicant is re-

[2] In addition, even assuming that petitioner had established ineffective assistance by his third attorney during the period from April 2003 until June 2006, as alleged in his second motion to reopen, by April 2003 any motion to reopen already would have been time-barred. Although petitioner's second motion to reopen also alleges ineffective assistance by his first two attorneys, petitioner had already made such allegations in his first motion to reopen, which the Board denied, and petitioner did not seek review of the Board's denial in the court of appeals. The Board's rejection of that allegation therefore should be regarding as binding for present purposes.

quired to show that he "is eligible to receive an immigrant visa and is admissible to the United States for permanent residence * * * and * * * an immigrant visa is immediately available to the alien at the time the application is filed." 8 U.S.C. 1255(i)(2). Generally, two governmental approvals are required to make such a showing for an employment-based immigration preference: (1) approval by the Department of Labor of an application for alien labor certification, and (2) approval by the Department of Homeland Security of a visa petition for the benefit of the adjustment applicant who is to fill the position. The issuance of the labor certification establishes that the alien is not inadmissible under 8 U.S.C. 1182(a)(5)(A)(i), which requires an employer of an alien seeking admission to the United States to perform skilled labor to first obtain certification from the Secretary of Labor that there are not sufficient workers to perform the particular labor in the relevant area. The approval of the visa petition with a current priority date, on the other hand, establishes that an immigrant visa is immediately available to the alien. See *United States* v. *Ryan-Webster*, 353 F.3d 353, 355-356 (4th Cir. 2003) (describing process and the significance of each step). Petitioner argued in his second motion to reopen that he was the beneficiary of a labor certification, but he did not argue or include evidence showing that he had ever received an approved visa petition. Petitioner's failure to demonstrate eligibility for the relief he requested thus also would have warranted the denial of his motion to reopen.

2. Assuming that petitioner's motion to reopen was untimely or number-barred and those bars were not subject to equitable tolling, the question becomes whether the court of appeals erred in holding that it lacks ju-

risdiction to review the Board's decision not to reopen the proceedings *sua sponte*. Although petitioner contends generally (Pet. i) that the court of appeals erred in holding that it lacked jurisdiction to review the denial of reopening, he does not argue in particular that the court of appeals erred with respect to *sua sponte* reopening. The court of appeals' decision was correct on that score.

Because petitioner's second motion to reopen was time-and number-barred, the Board considered whether to reopen petitioner's case *sua sponte*. Pet. App. 8-9. The Board declined to exercise its discretion to reopen the case *sua sponte*, *ibid.*, and the court of appeal held that it lacked jurisdiction to review that determination, *id.* at 4. In support of its conclusion that denials of *sua sponte* reopening are unreviewable, the court of appeals cited *Peralta* v. *Holder*, 567 F.3d 31, 34 (1st Cir. 2009), and *Luis* v. *INS*, 196 F.3d 36, 40-41 (1st Cir. 1999), both of which held that the decision whether to reopen removal proceedings *sua sponte* is unreviewable because it is committed to the Board's discretion by law. Under the Administrative Procedure Act, judicial review is not available when "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). As the *Luis* court explained, that is true with *sua sponte* reopening because "[t]here are no guidelines or standards which dictate how and when the [Board] should invoke its sua sponte power." 196 F.3d at 40-41; see *Peralta*, 567 F.3d at 34 ("The [Board's] discretion in this regard is unfettered; there are no standards in place by which a court can review the use or non-use of that sua sponte discretion."). Furthermore, unlike the statutory and regulatory provisions allowing an alien to file a motion to reopen, the regulation permitting the Board to reopen a case *sua sponte* establishes a procedural mechanism for

the Board itself in aid of its own internal administration. It does not confer any privately enforceable rights on an alien. Accordingly, the Board's decision whether to reopen proceedings *sua sponte* is committed to agency discretion by law and not reviewable by a court.

The decision below is consistent with the unanimous view of the courts of appeals that a denial of *sua sponte* reopening is not subject to judicial review. See *Peralta*, 567 F.3d at 34 (agreeing with ten other courts of appeals).[3] Petitioner does not contend that there is any disagreement in the circuits on this point. Further review is therefore unwarranted.

---

[3] In *Kucana*, which held that 8 U.S.C. 1252(a)(2)(B)(ii) generally does not preclude judicial review of the denial of a motion to reopen, the Court recognized that ten courts of appeals had agreed that denials of *sua sponte* reopening are unreviewable because sua sponte reopening is committed to agency discretion by law. 130 S. Ct. at 839 n.18.

CONCLUSION

The Court should grant the petition, vacate the decision below, and remand the case to the court of appeals for further consideration in light of *Kucana* v. *Holder*, 130 S. Ct. 827 (2010), and the Solicitor General's views on the first question presented stated herein. In the alternative, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
STACEY I. YOUNG
Attorney

APRIL 2010